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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 170

MICHAEL ZAFFARANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 330 F. 2d 114. A previous opinion of the court of appeals is reported at 306 F. 2d 707.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1964, and a petition for rehearing was denied on May 11, 1964 (Vol. I).[1] The petition for a writ of certiorari was filed on June 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The record is in four volumes, to which reference will be made by their Roman numerals.

QUESTION PRESENTED

Whether the district court acted within its proper discretion in denying petitioner's motion to withdraw his plea of guilty made more than two years after its entry.

STATEMENT

Petitioner and one Potenza were indicted in the United States District Court for the Northern District of California for (1) the interstate transportation to California of travelers checks stolen in New York in violation of 18 U.S.C. 2314; (2) concealment of this stolen property in violation of 18 U.S.C. 2315; and (3) a conspiracy to commit these offenses in violation of 18 U.S.C. 371.

On June 19, 1959, petitioner and his co-defendant Potenza appeared with counsel of their own selection: Mr. Edelbaum, their New York counsel, and Mr. Ehrlich, their San Francisco counsel. The government attorney, Mr. Constine, stated that the petitioner wanted to plead guilty to count 1 and that Potenza wanted to plead guilty to count 3, the conspiracy count, after which the government would move to dismiss the other two counts. At the late Judge Goodman's direction, the clerk then entertained guilty pleas from petitioner and Potenza (Vol. III, transcript of June 19, 1959, pp. 2–3). An F.B.I. agent testified as to the details of the robbery in which the travelers checks were stolen, the apprehension of petitioner and Potenza, and the pendency of New York criminal charges against them resulting from this robbery (*id.* at 4–10).

At a continuation of the proceedings on July 28, 1959 (Vol. III, transcript of July 28, 1959, p. 18), government counsel agreed with Mr. Ehrlich that the defendants had saved the government considerable expense by their guilty pleas. He explained that the three counts in the indictment resulted from the same act, but that there was a difference between the culpabilities of each defendant so that different pleas were accepted (*id.* at 23). Judge Goodman stated: "Well, I take everything in consideration you gentlemen have said, but nevertheless the judgment of the Court will be that the defendant Potenza serve a term of five years in Federal prison, and the defendant Zaffarano will serve a term of 10 years in Federal prison." The other two counts were dismissed (*id.* at 24).

On October 13, 1961, petitioner filed a "Motion to Vacate Judgment and Sentence" alleging that he had been denied the right of allocution before imposition of sentence (Vol. I). A hearing was held on October 25, 1961. At the hearing, Judge Wollenberg vacated and set aside the sentence imposed by Judge Goodman on the ground that petitioner had not been granted the right of allocution prior to the imposition of sentence (Vol. III, transcript of October 25, 1961, p. 4). On October 30, 1961, when asked if he had anything to say before resentencing, petitioner stated that his plea of guilty had not been voluntarily entered but had been induced by a deal between the attorney who represented petitioner at that time and the Assistant United States Attorney (Vol. III, tran-

script of October 30, 1961, pp. 3-7). Following this statement and prior to resentencing, petitioner moved the court for leave to withdraw his plea of guilty. The motion was denied, whereupon petitioner gave oral notice of appeal from such denial. The court then sentenced petitioner to imprisonment for ten years on count 1, with credit for the time served after July 30, 1959 (*id.* at 20–22). The court of appeals reversed the judgment of October 30, 1961, with directions that a hearing be held by the district court in connection with the charges made by petitioner in his motion for permission to withdraw his guilty plea. *Zaffarano* v. *United States*, 306 F. 2d 707 (C.A. 9).

At the hearing before Judge Carter, petitioner testified that at the time of arraignment on May 14, 1959, he told Mr. Ehrlich that he was going to plead not guilty, but Mr. Ehrlich said that he ought to wait for his attorney from New York (Vol. II, p. 42). After Mr. Edelbaum arrived from New York on June 18, petitioner discussed with him the possible sentences upon the federal, California, and New York charges against himself; and petitioner said that he did not want to plead guilty to the federal charges (Vol. II, pp. 48–51, 54–56). Mr. Edelbaum said that, if petitioner did plead guilty, he would ask the court to show leniency (Vol. II, p. 57). The decision to plead guilty was made on the morning of June 19, 1959, at Mr. Ehrlich's office, and the guilty plea was entered on that date (Vol. II, pp. 44–45). Mr. Ehrlich and Mr. Edelbaum told petitioner that if he would plead guilty, some leniency would be shown on the federal

charges and California would drop its charges against him (Vol. II, pp. 46, 52). Both attorneys told petitioner that the court would see that he got only 28 or 36 months on the federal charges (Vol. II, pp. 80–81).

Petitioner further testified that on July 28, 1959, he appeared with Mr. Ehrlich for sentencing (Vol. II, p. 86). Immediately after the 10-year sentence was announced by Judge Goodman, petitioner told Mr. Ehrlich that he wanted to withdraw his plea. After petitioner had been taken to the bull pen, he again told Mr. Ehrlich that he wanted to withdraw his plea since no leniency had been shown (Vol. II, pp. 93–95). Mr. Ehrlich left and returned in about 15 minutes with government attorney Constine, who stated to petitioner, "Look, I just left Judge Goodman. You are not going to do over 26 or 28 months, so don't worry about it. If you withdraw your plea you are only going to harm yourself, that's that" (Vol. II, pp. 95–96). Within 60 days after sentence, petitioner wrote Judge Goodman asking that he modify the sentence but the judge refused to do so (Vol. II, p. 99).

Mr. Edelbaum testified that at the conference in Mr. Ehrlich's office on June 19, 1959, Mr. Ehrlich stated that the case could not be defended successfully, and that he felt that, if petitioner and Botenza pleaded guilty, he could persuade the state authorities to dismiss the charges pending against him. Mr. Ehrlich said that he would have the government attorney call to the court's attention the fact that these men, by pleading guilty, would be saving the government the expense of a trial. Mr. Ehrlich sug-

gested that Mr. Edelbaum should bring to Judge Goodman's attention the severe punishment petitioner and Potenza might face if they went to trial on the New York indictments (Vol. II, pp. 118–120). Mr. Edelbaum further testified that neither he nor Mr. Ehrlich indicated that there was an agreement as to the sentence petitioner would get if he pleaded guilty (Vol. II, pp. 120, 136).

Mr. Ehrlich testified that from what government attorney Constine and his clients had told him, it would be a waste of time to try to defend the case, and he so informed his clients at their conference with Mr. Edelbaum. Mr. Ehrlich testified that during this conference he did not at any time state that he would obtain a certain sentence for petitioner (Vol. II, p. 165). Mr. Ehrlich denied that on the date of sentencing (July 28, 1959) petitioner while in the bull pen told Mr. Ehrlich that he wanted to withdraw his plea of guilty (Vol. II, p. 172). Mr. Ehrlich also denied that either he or government attorney Constine told petitioner that Judge Goodman had said he would "do no more than 26 or 28 months" (Vol. II, pp. 172–173).

Government attorney Constine testified that he discussed with Mr. Ehrlich the nature of the government's case as shown by the search warrants which had been issued (Vol. II, p. 142). Mr. Constine advised Mr. Ehrlich that if was the policy of his office to make no recommendation as to the sentence, that being a matter entirely for the accused, the court, and the probation office (Vol. II, p. 144). Mr. Constine said

that he had no power to dismiss the California charges against petitioner, but that the state district attorney could dismiss them (Vol. II, pp. 144–145).[2] Mr. Constine told Mr. Ehrlich that he would advise the court that pleas of guilty would save the government considerable expense (Vol. II, pp. 146–147). On July 28, 1959, following the sentencing proceedings, Mr. Ehrlich, in petitioner's presence, asked Mr. Constine to step over to the bull pen. Mr. Constine stated that it was the policy of his office to make no recommendation for or against parole. When petitioner asked whether the judge would reconsider the 10-year maximum sentence, Mr. Constine said that petitioner had 60 days in which to apply for modification and that he should attend to that with Mr. Ehrlich (Vol. II, pp. 148–150). Mr. Constine denied that he told petitioner, "I spoke to Judge Goodman and he says that you will do no more than 26 or 28 months" (Vol. II, pp. 151–152).

On February 15, 1963, in denying petitioner's motion to withdraw the plea of guilty, the court found that (1) petitioner was not told by anyone that he would be given leniency by the court and the government attorney to... him that they would attempt to present the matter so that the court could exercise leniency if it so desired; (2) neither Mr. Ehrlich nor Mr. Constine guaranteed petitioner that a sentence

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[2] Subsequently, between the time of petitioner's original plea and his motion to withdraw it, the California charges against petitioner were dismissed and he was given a suspended sentence in New York (Vol. II, pp. 247, 145, 136–137; Vol. III, transcript of October 30, 1961, p. 11).

of 26 to 28 months would be imposed; (3) petitioner did not, immediately after sentence was imposed, state to anyone that he wanted to withdraw his plea of guilty; and (4) petitioner was advised by Mr. Constine that he could ask to have his sentence modified, but he wrote the court only to modify his sentence, not to withdraw his plea of guilty (Vol. IV, pp. 12–14). The court then denied petitioner's motion as an "afterthought" after his sentence had been vacated (Vol. IV, pp. 20–22):

> [N]o word about his desire to withdraw his plea was communicated to the Court until after he disposed of these very serious state charges pending against him. In this respect, in his own statement made to Judge Wollenberg, Zaffarano indicates that this aspect was considered by the New York courts in making the disposition that was made in New York, where a suspended sentence was given because he already had a stiff federal sentence hanging over him and, of course, the California charges were dismissed because the matter insofar as the prosecution was concerned was being taken care of in the federal courts, and to this extent the State of California, knowing the serious charges that were pending in New York and that he had pleaded guilty in the federal court and awaiting a federal sentence, dismissed the charges.
>
> Now, all these circumstances would tend to indicate Mr. Zaffarano in this situation has developed a theory of getting around the federal case and he has manufactured a story which will fit him within the federal rules so that the

> plea of guilty will be set aside and he can proceed then to trial after the case is five years old, and therefore the situation is one which, it seems to me, that the Court should not accept the motion and should and therefore I will deny the motion to set aside the plea, and will proceed to judgment and sentence.

The court of appeals affirmed the judgment of the district court.

ARGUMENT

The facts which are summarized in the Statement amply refute petitioner's contention that the district court abused its discretion in denying the motion to withdraw the plea of guilty. Even though at the time of the plea of guilty the court did not directly inquire of petitioner as to voluntariness, the surrounding circumstances were sufficient to indicate that the plea was voluntary. Petitioner appeared with two highly experienced attorneys of his own choosing who did not question the government's statement that petitioner wanted to plead guilty to count 1. Petitioner, who was no novice to criminal proceedings, expressly stated that he wanted to enter this plea. No particular ritual is necessary for compliance with Rule 11, F.R. Crim. P., so long as the court can reasonably infer from the attendant circumstances that the plea is made voluntarily and with understanding of the nature of the charge. *United States* v. *Swaggerty*, 218 F. 2d 875, 879 (C.A. 7), certiorari denied, 349

His counsel admitted that prior to the entry of his plea of guilty he had had "experience in both state and federal courts" (Vol. II, p. 101).

U.S. 959; *Bone* v. *United States*, 305 F. 2d 772, 773 (C.A. 8), certiorari denied, 374 U.S. 503.

A plea of guilty may be vacated after sentence only "to correct manifest injustice" (Rule 32(d), F.R. Crim. P.), and the district court has broad discretion in making this determination (*e.g.*, *United States* v. *Roland*, 318 F. 2d 406, 409 (C.A. 4); *Scott* v. *United States*, 292 F. 2d 49, 51 (C.A. 6), certiorari denied, 368 U.S. 879). Petitioner's motion to withdraw his plea of guilty was made more than two years after his plea and original sentencing. While the original sentence was set aside on the ground that petitioner was denied the right of allocution, it is surely not a complete nullity. It would be exalting a technicality to say that petitioner's motion to withdraw his plea before he was resentenced should be treated as a motion before sentencing. Indeed, the circumstances in this case are particularly strong for allowing withdrawal of the plea only on the basis of manifest injustice because, as a result of petitioner's delay, the government's case has long since become stale.

There can be little doubt that petitioner failed to show that setting aside the plea was needed to correct manifest injustice. Petitioner has never asserted that he is innocent of the federal crimes.[1] His claim that his plea was induced by promises was refuted by his counsel and not believed by the trier of fact.

In any event, even if petitioner's motion could be deemed the equivalent of one made to withdraw a

[1] In one of petitioner's exhibits he admitted complicity in the related New York charges (Vol. II, pp. 271, 269).

plea of guilty before sentence, petitioner has shown no reason for withdrawal of the plea. While withdrawal before sentence normally is allowed freely (see *Poole* v. *United States*, 250 F. 2d 396, 400 (C.A. D.C.); *United States* v. *Roland, supra*), withdrawal is not a matter of right, and discretion rests with the district court (*United States* v. *Nigro*, 262 F. 2d 783, 787 (C.A. 3); *Vasquez* v. *United States*, 279 F. 2d 34, 37 (C.A. 9); *Hoyt* v. *United States*, 252 F. 2d 460, 462 (C.A. 10)). The district court here plainly did not abuse this discretion when it refused to allow petitioner's withdrawal of the plea after a delay of more than two years when the plea was deliberately entered on the advice of experienced counsel of his own selection. See *Young* v. *United States*, 302 F. 2d 511 (C.A. 1), certiorari denied, 371 U.S. 829; *United States* v. *Moore*, 290 F. 2d 501 (C.A. 2), certiorari denied, 368 U.S. 837.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964